JOINT COMMITTEE ON COURT REFORM
REPORT ON ONTARIO COURT ADMINISTRATION

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Advocates' Society
Canadian Bar Association - Ontario
County of York Law Association
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REPORT ON ONTARIO COURT ADMINISTRATION
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INTRODUCTION

The justice system must apply the law evenhandedly to all, without regard to special interests, governmental or otherwise. It would be a mistake to view the Ontario courts system as simply another government department. Our justice system is fundamental to our democratic process.

Our citizens expect from the justice system protection of their rights and freedoms in a timely, responsive and affordable manner. To achieve these ends, adequate resources and effective management of the judicial system are essential.

Members of the bar are keenly interested in a justice system in which their clients' interests can best be advanced. Presently the justice system falls far short in delivering responsive, efficient and accessible justice. Court delays increasingly threaten to distort the outcome of cases and reduce the quality of adjudication. Frequently we see injustice caused by delay and inadequate resources in the justice system.

These problems have become more glaring with recent changes and the recession. During early 1991 the bar became concerned with the consequences of the massive changes in the system including merger of the District and Supreme Courts in 1990, and the creation of a new regional management structure. The difficulties were exacerbated by the coincidental increase in caseloads and governmental fiscal restraint. Problems developed in the working relationships between members of the bench, bar and government. As a result, the Joint Committee on Court Reform decided to establish the present Committee on Court Administration to identify and understand the source of difficulty, and to study and make recommendations with respect to the future organization of administration and funding of the Ontario courts.

The Joint Committee on Court Reform was formed in 1988 and represents the views

of The Advocates' Society, Canadian Bar Association - Ontario, The County of York Law Association, the Criminal Lawyers' Association and includes representatives from the Law Society of Upper Canada.

The Court Administration Committee began meeting in May of 1991. We began by inviting to our meetings, representatives of the groups which comprise the essential elements of the system. Of particular help was the role played by representatives of the Ministry of the Attorney General, who freely and generously provided statistical and organizational information which helped us understand the administration and funding of the current system. They outlined concerns from the perspective of those working in the Ministry. Similarly, the representatives of the bench were of great help in bringing their perspectives and experience to these important questions. This Report and its recommendations are the product of these cooperative discussions.

The Committee also engaged in a process of province-wide consultation to develop consensus. Research was conducted into administrative systems in place in other jurisdictions to assist in formulating recommendations about the appropriate model for the administration of courts in Ontario.

It soon became apparent that there was recognition by all of the existence of serious problems, and a common commitment and desire to address these problems in a constructive fashion.

It also became clear that the present organization of the justice system makes conflict inevitable. The government, on the one hand, is a primary litigant before the courts, yet on the other hand, is simultaneously responsible for the administration of the justice system. The dual role results in an obvious inherent conflict.

To apply the law evenhandedly, the judiciary must be independent. A significant and

essential aspect of judicial independence is autonomy in administrative terms[1]. In Ontario, administrative responsibility lies principally with the Attorney General. In recent years the government has attempted to implement policy and administrative changes in an effort to make the courts more efficient. Unfortunately, these changes, made with the best of intentions, too often have been implemented without meaningful consultation with the judiciary and bar. The justice system is so complex that unilateral action cannot be effective. Unilateral action leads to misunderstanding and encroachment upon judicial independence. Unproductive conflict is an inevitable result.

The effect of the inherent conflict becomes obvious when systemic problems must be addressed in a comprehensive way. Presently, there is no clear division of responsibility between the judiciary and the government in some of the most sensitive and important aspects of court administration. This detracts from accountability to the public. Unless there is fundamental change, there will be continuing miscommunication and conflict.

The participants in our Committee recognize the flaws in the present structure. The goal of the Committee was not to assign blame, but rather to understand the system and to improve it. We also recognize that problems have become more acute as a result of both merger and the current economic realities in times of restraint. A first step was understanding the problem. The second critical step was to formulate practical solutions. What emerged was a system with greater potential to serve the public.

The concerns which led to the formation of the Committee are not new and the suggested solutions are not radical. They have evolved over time.

The Committee recommends that the judiciary assume the primary responsibility for the administration of the Ontario courts. This is consistent with the suggestions made for court reform in Canada over the last fifteen years, and with solutions adopted in other jurisdictions facing similar problems. This suggested reorganization is in the public interest, and is

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[1] Canadian Bar Association Task Force Report, Court Reform in Canada, August, 1991, p.21, following Valente v.R.

consistent with the recommendations in Ontario in the **White Paper on Courts Administration** in 1976, and in Canada in the **Deschênes Report** in 1981.

The public is entitled to responsible, efficient and accessible justice. It is the view of the Committee that fundamental restructuring, giving responsibility to the judiciary for the administration of the courts, is part of the solution to achieve these ends. It is consistent with the principle of judicial independence necessary for the operation of the courts in a democratic society. Increased responsibility for the judiciary carries with it increased accountability to the public, both administrative and fiscal.

This report is divided into four parts.

I Summary of Recommendations
II An Outline of the Problems in the Current System in Ontario and the Need for Change
III A Review of Historical Context Including Approaches Taken in Other Jurisdictions
IV Recommendations for Change in the Immediate and Medium Term

PART I SUMMARY OF RECOMMENDATIONS

The Committee recommends that:

1. Immediate steps be taken to implement an *ad hoc* court administrative structure whereby the Ontario courts are jointly administered in all respects by the judiciary and Courts Administration Division of the Ministry of the Attorney General.

2. Within the medium term, legislation be enacted to provide for the judiciary to take responsibility for the Ontario courts and related services to ensure accessible, high quality justice for the public with appropriate funding by means of a non partisan process.

PART II OUTLINE OF CURRENT PROBLEMS IN THE ADMINISTRATION OF JUSTICE AND COURT MANAGEMENT

The Committee has identified a number of problems in the existing system which underline the need for a new management structure. These include:

- o Inherent conflicts in the administrative roles,
- o Present management is crisis management,
- o Administration is inadequately funded,
- o Administrative problems are preventing the timely processing of cases, creating delays and costs to the public,
- o Defects in the present system are causing its participants to be frustrated and not to work optimally together.

Inherent Conflicts in Administrative Roles

The judiciary presently has no statutory jurisdiction over staff, budget, financing, technology, organization, plant, security or any of the necessary infrastructure of the Ontario courts. Statutory responsibility lies with the Attorney General of Ontario, administered through the Courts Administration Division of the Ministry of the Attorney General.

In Ontario the staff who administer our justice system serve two masters. They are hired and paid by the Ministry and report directly to it. Paradoxically, their work tends to be directly in aid of adjudication which is the exclusive responsibility of the judiciary. The duality of staff responsibility leads to conflict, inefficiency and confusion.

Effective management, in an organizational sense, is confounded at the outset by the essence of the 'service' being provided. The role of arbiter of disputes, most frequently between the State and its citizens, mandates that the courts be independent from the provider of the resources necessary to enable the adjudicative function.

A report by the Canadian Bar Association Task Force on **Court Reform in Canada** dated August, 1991 described the issue in the following terms:

> The question of where the responsibility for court management and administration should lie is an intricate one which raises questions about judicial independence, public accountability and jurisdictional cooperation. With respect to judicial independence, one view is that it is the judges' function to adjudicate, not administer. Involvement by judges in administration and management, it is argued, may undermine judges' independence because the administration and management functions will inevitably involve discussion with government about budgets and policies and may lead to the involvement of judges in such matters as staff relations and contract administration. Others take the opposite view. Judges, it is argued, must be masters in their own house to protect their capacity to administer justice independently, fairly and efficiently. Moreover, almost everyone agrees that judges must retain control over such matters as case assignment and the list and it would be sensible on both logical and pragmatic grounds to add to that necessary core of judicial control other administrative responsibility.[2]

The conflict is not a petty one. Mr. Justice LeDain wrote on behalf of the Supreme Court of Canada in **Valente v. The Queen**, [1985] 2 S.C.R. 708:

> "The third essential condition of judicial independence for purposes of section 11(d) is in my opinion the institutional independence of the tribunal with respect to matters of administration bearing directly on the exercise of its judicial function. The degree to which the judiciary should ideally have control over the administration of the courts is a major issue with respect to judicial independence today. Howland C.J.O. drew a distinction, for purposes of the issue in the appeal, between adjudicative independence and administrative independence which is reflected in the following passages in his reasons for judgment at pp.432-433:
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> > "...In Ontario the primary role of the judiciary is adjudication. The Executive on the other hand is responsible for providing the courtrooms and the court staff. The assignment of judges, the sittings of the court and the court lists are all matters for the judiciary. The Executive must not interfere with, or attempt to influence the adjudication function of the judiciary. However, there must necessarily be reasonable management constraints. At times there may be a fine line between interference with adjudication and proper management controls. The heads of the judiciary have to work closely with the representatives of the Executive unless the judiciary is given full responsibility for judicial administration..."[3]

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[2] Canadian Bar Association Task Force Report, Court Reform in Canada, August, 1991, p.22.

[3] Valente v. The Queen, [1985] 2 S.C.R. 708.

Mr. Justice LeDain continued:

> "Judicial control over the matters referred to by Howland C.J.O. - assignment of judges, sittings of the court and court lists - as well as the related matters of allocation of court rooms and direction of the administrative staff engaged in carrying out these functions, has generally been considered the essential or minimum requirement for institutional or "collective" independence..."[4]

The Canadian Bar Association Task Force Report on Court Reform contains the following observation:

> Although the debate about basic principles is far from over and the details are by no means settled, there has been growing recognition of the importance of effective management of the courts, the necessity for strong judicial involvement in it and the need for close cooperation between the judiciary and court administrative staff. The need for effective management is clear; it is simply good stewardship of the public funds expended. Moreover, inefficiency, waste and undue delay sap public confidence in the courts. The need for strong judicial involvement is also patent.[5]

The present separation of control over the different elements essential to providing the service frustrates the application of traditional management concepts and, in the absence of a very high degree of communication and cooperation, leads to serious problems. While it is not the intent of this Report to focus on past problems some examples are necessary to give substance to the discussion of the issues.

Crisis Management

Askov v.R., [1990] 2 S.C.R. 1199 and the Ministry of the Attorney General's response to it, is an example of a crisis management rather than a progressive, forward-looking and thoughtful style of management. The response to the mounting problems set out in Askov highlighted the inability of the Courts Administration Branch, as then organized and funded, to remedy problems in the criminal justice system.

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[4] Valente v. The Queen, [1985] 2 S.C.R. 708.

[5] Canadian Bar Association Task Force Report, Court Reform in Canada, August, 1991, p.23.

In early 1986, the Supreme Court of Canada issued a warning signal to government with respect to trial delays. In the reasons in **Mills v. The Queen**, [1986] 1 S.C.R. 863, Lamer J. delivered this message:

> "...The criminal justice system will have to be accorded greater priority; it may also be that within the criminal justice system greater priority will need be given to providing sufficient resources, both human and financial, for the courts and the Crown offices. By giving effect to the rights of the accused under Section 11(b), governments will be addressing the problem of providing sufficient resources for the administration of criminal justice. Failure to do so, however will lead to the result which all would prefer to avoid, the freeing of the guilty for reasons other than failure on the part of the Crown to discharge its burden of proof."[6]

Confronted with an inability to keep pace with exploding trial lists, the judges of what is now the Ontario Court (Provincial Division) took the unusual step of forming a Special Committee on Criminal Justice in Ontario. They delivered a Report in December, 1986, which opined in part that:

> Situations of trial backlogs exist in some areas of the province which render it impossible for the courts to abide by the guidelines suggested by the Supreme Court. Unless the Provincial Government is prepared to assume the ultimate responsibility for situations in which potentially guilty persons will be free without trial, it must immediately address the existing inadequacy of judicial resources.[7]

At a time when the caseloads in some areas of the provincial court increased by more than 125%, no corresponding increase in the judicial complement was available. The issue peaked in Askov with the guidelines on delay then offered by the Supreme Court of Canada. The justice system was unable to satisfy the guidelines with the result that more than 50,000 charges were stayed or dismissed. The dismissal of charges caused enormous grief and feelings of injustice to victims and members of their families, as well as an undermining of confidence in the quality of justice being provided. In dollar terms, it required the sudden infusion of $27,000,000 of additional money, which in turn sapped resources from other government programs.

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[6] Mills v. The Queen, 1986 1 S.C.R. 863.

[7] Report by the Provincial Criminal Court Judge's Special Committee on Criminal Justice in Ontario, December, 1986.

Resources previously allocated to the civil and family courts were shifted to expedite the hearing of criminal cases at the expense of the civil system. Existing, unacceptable backlogs in those courts were increased.

Excessive delays in family and civil courts require immediate attention. Judicial resources are being taxed beyond their limits without adequate support. This problem, the result of chronic underfunding, remains to be addressed. Court delays threaten to distort the outcome of cases and reduce the quality of adjudication. Timely determination of legal disputes is increasingly jeopardized.

Judicial responsibility has inevitably changed as a consequence of the power vested in the courts by the **Charter of Rights and Freedoms**. The public reaction to this change has been to increasingly blame the judges for the shortfalls within the system, over which the judiciary in reality have little control. These powers and responsibilities militate in favour of increased actual control.

In the recent **Morin** decision, Mr. Justice Sopinka of the Supreme Court of Canada has said:

> "How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render section 11(b) meaningless. The court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources ..."[8]

Given that judges are being required to determine acceptable institutional delay periods, the transfer to the judiciary of responsibility for delay reduction is appropriate.

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[8] Morin v. The Queen, unreported decision of the Supreme Court of Canada, March 26, 1992.

Inadequate Funding

The courts administration budget has been shrinking relative to other budgets within other Ministries.

In times of economic restraint the administration of justice is acutely affected by any government cutbacks whether isolated or across the board. Any diminution in the justice budget significantly affects services to the public.

Not only has the courts administration budget been shrinking in prior fiscal years but it is noted that the Treasury Board has identified the Ontario courts system as an area for review within the economic planning for the Province. It is the intent of the review "to improve efficiency and increase revenue by focusing on policy reform, changes to administrative practices, and changes to fees, fines and tariffs".[9] The statement appears to be directed solely to fiscal concerns without careful attention to such issues as accessibility and impartiality.

The Committee is concerned that not only has the justice budget been decreasing in percentage terms, but also that funds which have been allocated to the administration of justice have not been used as cost effectively as possible.

Regionalization has brought with it benefits and problems. Too little attention has been given to assessing the general needs and staffing requirements of each region, on a region by region basis. The result has been, in some regions, an unnecessary increase in bureaucracy at significant cost to the public, while other regions appear to be understaffed and underfunded.

This Committee has reviewed the number of regional directors and of their support staff. At the present time, four regions are being managed by two regional directors. Experience has shown that the extensive staff hired at the time of merger is not necessary.

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[9] Ontario Fiscal Outlook, "Meeting the Challenges", Ministry of Treasury and Economics, January, 1992, p. 41.

It appears that the system is top heavy and in some regions overstaffed with expensive senior management. This issue is one that should be addressed immediately with full judicial participation and consultation with the bar in all regions. The Committee does not suggest any reduction in the number of regions. Instead, it recommends an administrative realignment.

A large part of the problem with the allocation of funding in the present system is that decisions are made by Ministry representatives not intimately familiar with the day to day operations and needs of the courts. By way of contrast, the members of the judiciary are familiar with the problems of the courts. An understanding of existing problems is a first and critical step in developing solutions. We note that in the management of our law firms while the application of professional management techniques by professional managers is extremely useful, in the final analysis a firm's lawyers must be called upon to make the final decisions affecting their firm. Lawyers best understand their firm's real needs and have the final responsibility for its welfare. Similarly, as the judges are ultimately responsible for the quality of the justice dispensed by the justice system, they should have ultimate control of its management.

Administrative Problems Which Prevent Timely Caseflow

Policy determinations are made by employees of the Ministry of the Attorney General who govern and direct the courts support staff. Directions are provided to court administrators whose responsibility is to interpret and carry out policy, which may have a direct impact upon members of the judiciary in fulfilling their adjudicative functions. They establish the numbers, qualifications and activities of the court reporters, law clerks, court clerks and all of the individuals comprising the support staff of the court. They are employed, trained, and directed generally without consultation of the judges and are totally under the control of the Ministry.

As a result of this lack of consultation in many regions, there are problems. The lack of clerks or reporters not infrequently prevents courts from starting on time. The court administrative staff have prescribed hours and, due to budget restraint, restrictions have been placed on overtime. There are instances where judges wish to work beyond the usual court hours to complete a matter, but they are prevented from doing so because the court staff have

not been authorized to stay and be paid.

The Committee has consulted with members of the bar across the province. We have received reports of serious problems in many areas. Trial lists are prepared by some court administrators without an adequate appreciation of the time required to complete cases. There are widespread reports of increased delay in the hearing of cases and of motions as compared to the situation which existed before merger, particularly with respect to cases which formerly would have been in the District Court. We have been advised that in some regions where trials dates could be readily obtained before merger, litigants are waiting several years for their cases to be reached. In other areas, trials are being called on extremely short notice. Inadequate scheduling causes litigants extra expense, frustration and in extreme cases injustice.

Court reporters and reporting are controlled by the Ministry. The unavailability of court transcripts causes unnecessary delays in proceedings and in appeals. The bar and bench are powerless to make changes to shorten these delays.

The provision of administrative and secretarial assistance to judges is within the direct control of the Ministry. The shortage of these critical resources, in many instances, has led to decisions not to give full written reasons which work to the benefit of the public by developing and clarifying the law.

Where there has been active judicial involvement in administrative matters we have seen positive results. Examples of such results stemming from judicial initiative in the General Division are the success of specialty courts such as the commercial list, and various initiatives in reducing the delay in determining civil and criminal cases. Those initiatives include the implementation of automated case management systems in several centres and the team concept in relation to criminal cases in Toronto Region. In the Provincial Division, the establishment of special "duty courts" respecting pre-trial proceedings in downtown Toronto, Etobicoke and Brampton has achieved quite striking results in reducing the criminal trial backlog and has very substantially reduced expenditures incurred in relation to procuring the attendance of civilian and police witnesses. Additionally, management information systems implemented by the Chief Justice of the Ontario Court (General Division) and the Chief Judge

of the Ontario Court (Provincial Division) since court reorganization have already proven successful in equalizing judicial workloads and in making more optimal use of existing resources.

Frustration - Judiciary and Court Administrative Staff

The judiciary and the court staff have the talent and desire to serve the public. To do so they need a clear, unified management model with defined lines of responsibility.

The present system does not encourage the development of leadership potential in the managers of the courts and initiative in those working for them. Career opportunities for talented, ambitious staff are restricted, and the ability of the judges to promote staff from within is virtually non-existent. A system where staff were directly responsible to the judiciary would, in our view, better utilize and motivate both the judiciary and their staff. Those ultimately responsible for the operation of the courts, the judges, would be forced to make hard decisions about staffing and spending priorities.

PART III A REVIEW OF HISTORICAL CONTEXT INCLUDING APPROACHES TAKEN IN OTHER JURISDICTIONS

Our situation in Ontario in the 1990's is not unique. In fact, it is typical of the situation facing court administration in Canada and abroad. Anecdotal evidence of conflicts between the judiciary and the executive can be found in common law and civil law countries, throughout the world. Recent efforts to develop a new organizational framework for court administration can be cited in jurisdictions as diverse as Australia, the United States, Sweden and Columbia.

Beginning in the 1960's, provinces throughout Canada began shifting administrative responsibility for the magistrates courts from local municipal governments and local court registries to provincial ministries. The need for adequate funding and modern administration meant that magistrate's courts would no longer be funded and administered by local

governments, and active and interested local judges would no longer have the same influence over court operations. Efforts to bring in new technology and to improve personnel management and record systems all emphasized the development of expertise less readily available to most local courts. In the process, Ministry head offices became increasingly important throughout Canada, and the judiciary increasingly concerned about the power and influence of those offices.

Paradoxically, the present proposals to make court administration operate efficiently and independent of government have arisen at least in part from past governmental attempts to modernize court administration and to make it more efficient. The next step in the evolution is to provide a management model to fulfil these objectives.

Canadian Proposals for Alternate Administration Models

Especially relevant for our consideration are the proposals and policies developed in Canada over the past twenty years. These have almost universally involved restrictions on the discretion of executive branches of government, along with an increased role for the judiciary to direct the activities of court officials.

One of the earliest such proposal is embodied in the 1976 Ontario **White Paper on Courts Administration**. It was recognized at the time that the "present structure has the potential to diminish public confidence in the administration of justice".[10] The 1976 White Paper proposed that court administration be the responsibility of a Judicial Council made up of judges from the Court of Appeal, the two Section 96 trial courts and two divisions of the Provincial Court. A number of management functions would remain within the Ministry, and the budget recommended for the courts by the Council would require Ministry approval before submission to the legislature.

The White Paper originated as a Ministry response to an impasse between judiciary and executive when a pilot court administrative region (Central West in the Hamilton area)

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[10] White Paper on Courts Administration, Ministry of the Attorney General of Ontario, October, 1976, p.12.

attempted to implement a caseflow management program. Initial enthusiasm at senior levels of the Ministry cooled in the face of scepticism within the bar. The Judicial Council proposal never went forward, although Attorney General McMurtry and Chief Justice Howland subsequently agreed on the establishment of two provincial consultative bodies.

Another approach to court administration emerged in British Columbia following a major court reform effort in 1973-75, during the tenure of the province's first NDP government. Chief Justice Nathan Nemetz obtained the agreement of the provincial government that the judiciary would be responsible for "judicial administration", with the definition of that phrase left to future negotiations.[11] The judiciary would also receive a separate budget for "judicial administration" as opposed to court administration. While the judicial budget later expanded to include trial coordinators as well as the judges' confidential staff, it still covers only a narrow range of court administrative functions. Chief Justice Nemetz's hope that judicial control over court administration could be extended has not been realized.

The Supreme Court of Canada and Federal Court of Canada each receive a degree of administrative autonomy greater than the Court of Appeal and the Ontario Court of Justice (General Division) and (Provincial Division). Today, those two courts are administered by senior public servants of deputy minister rank who are responsible to the chief justices of their respective courts. The courts' budgets are still part of the estimates of the federal Department of Justice, but they are developed within each court.

In 1981, a landmark report on the independent judicial administration of the courts was published by the Canadian Judicial Council. Titled **Maitre Chez Eux/Masters In Their Own House** the report was written by Jules Deschênes, then Chief Justice of the Quebec Superior Court. The report made 198 recommendations, including detailed changes in provincial and

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[11] Address given in Winnipeg to the Canadian Bar Association August 31, 1976 and Victoria Bar, September 30, 1976 by The Honourable N.T. Nemetz, Chief Justice of the Supreme Court of British Columbia, "Judicial Administration and an Independent Judiciary".

federal statutes affecting the tenure of judges and control of their work.[12]

The report proposed a three-stage framework for shifting responsibility for court administration from the executive to the judiciary. Stage One was consultation, Stage Two decision-sharing, and Stage Three independence. At the third stage, courts would be administered by a judicial council (similar to that proposed in the Ontario White Paper), and the court budget would be submitted directly to the legislature for consideration by a Special Committee on Judicial Affairs. Following its release of the Deschênes Report, the Canadian Judicial Council formally endorsed Stage Two, but declined at the time to endorse Stage Three.

Support for independent administration of the courts came from other sources, but did not result in legislative action. Perry Millar and Carl Baar's 1981 text, **Judicial Administration in Canada**, strongly endorsed judicial control of court administration as part of an overall strategy to modernize court management and improve the administration of justice.[13]

Deschênes took a leadership role in developing international draft standards for the independence of justice covering judges, lawyers, jurors and assessors. He organized an international meeting in Montreal that endorsed a Universal Declaration on the Independence of Justice.[14] A subsequent report to the United Nations by L.M. Singhvi,[15] currently India's ambassador to the United Kingdom, built on the Montreal Declaration. The proposed standards are now being studied by U.N. committees prior to endorsement by the General Assembly. Meanwhile, however, Canadian reforms in court administration have made little

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[12] Jules Deschênes, Maitre Chez Eux/Masters in Their Own House: A Study on the Independent Judicial Administration of the Courts, (Montreal: Canadian Judicial Council, September, 1981).

[13] Perry Millar and Carl Baar, Judicial Administration in Canada, (Kingston and Montreal: McGill-Queen's University Press, 1981), Chapters 1 and 3.

[14] Shimon Shetreet, "The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration", Judicial Independence: The Contemporary Debate, edited by Shimon Shetreet and Jules Deschênes, (Dordrecht, The Netherlands: Martinus Nijhoff Publishers, 1985).

[15] L.M. Singhvi report to the United Nations. Refer to Judicial Independence: The Contemporary Debate, edited by Shimon Shetreet and Jules Deschênes, 1985.

headway during the 1980's.

Canadian demands for a shift from executive to judicial control of court administration can be traced in part to specific conflicts within other government controlled jurisdictions. Concerns about protecting the autonomy of other major institutions in Canadian political life have emerged in recent years.

As the independent auditing function, essential to the accountability of public agencies, is professionalised, steps have been taken to ensure greater independence for the federal Auditor-General and Provincial Auditors. The need for effective legislative bodies has led to recommendations for their independent administration; Dalton Camp headed an Ontario Commission that made such recommendations in the early 1970's. The growth of Ombudsmen to monitor government administration has been paralleled by a growth of independently administered Ombudsmen offices.

As increasing independence has been granted to other major institutions, the wisdom of affording similar independence to our judicial institutions has become increasingly obvious. Judicial institutions are certainly as important as other institutions. Judicial independence is a cardinal constitutional principle fundamental to the Canadian system of government to protect the rights of the Canadian public.

Other Jurisdictions

Parallel developments towards recognition of independence of the judiciary may be observed in other countries. In 1986, Australian court leaders endorsed a concept of partnership between judiciary and executive that echoed Deschênes' Stage Two. By 1991, however, Australian states were moving closer to independent judicial administration. In particular, a Courts Commission (similar to Deschênes' Stage Three judicial council) was being organized in Victoria.[16] Similarly, by the second half of the 1980's, the Government of

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[16] A Courts Commission for Victoria: Issues, discussion paper prepared for the Steering Group of the Victorian Judicial Council Project, available through, Victoria Law Foundation, Australia. Also,see generally, Thomas Church and Peter Sallmann, Governing Australia's Courts (Victoria, Australia: Australia Institute of Judicial Administration Inc.,1991).

Sweden shifted responsibility for court administration from the Prime Minister's Office to an independent body called the Domstolsverket,[17] headquartered outside the capital city.

In England, the Lord Chancellor's Department (LCD) came to play a dominant role in court administration following implementation of the 1969 Beeching Report.[18] The increasingly centralized and professionalised LCD administration was facilitated by the independent judicial position of the Lord Chancellor himself. By the close of the decade, however, English judges grew critical of the department's administrative role; one proposal made by an authority on court administration in that country called for a judicial council similar to Ontario White Paper and Deschênes Report recommendations.

The United States is most frequently cited for examples of judicial control over court administration. The federal courts are administered by the Administrative Office of the United States Courts (OAC), which is responsible to the Judicial Conference of the United States, a statutory body made up entirely of federal judges and chaired by the Chief Justice of the United States. The federal judicial branch budget is developed by the AOC, under the direction of the Budget Committee of the Judicial Conference which is an all-judge committee, approved by the Judicial Conference and incorporated without change in the President's Budget submitted to the U.S. Congress. The Judicial Conference has existed since 1922, involved primarily with matters that British Columbia would term "judicial" and not "court" administration. The AOC was created in 1939. The AOC's creation can be traced to the efforts of court reformers in the bench and bar, and more immediately to the aftermath of Roosevelt's court-packing plan of 1937. Before 1939, U.S. federal courts were administered by the Attorney General of the United States.

Since the federal legislation of 50 years ago, state court systems throughout the United States have developed state level administrative offices responsible to the judiciary -- usually to the state chief justice and state court of last resort, not to a judicial council. Some states

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[17] Based on information provided by Professor Carl Baar of Brock University.

[18] Report of the Royal Commission on Assizes and Quarter Sessions, 1966-69, (London: HMSO, 1969) (Chairman: The Lord Beeching) (4153).

have provisions for the court budget to go directly to the state legislature, and one state (West Virginia) has a constitutional provision prohibiting either the governor or the legislature from reducing the court's budget request. However, executive budget officials in most states retain the authority to reduce court budget requests before they go to the legislature. In the United States, Attorney Generals play no role in Court Administration.

This survey of developments both inside and outside Canada highlights the trend for increasing judicial responsibility for the administration of courts and provides the context for the proposals hereafter set out. A bibliography setting out published materials reviewed by the Committee is appended to this Report.

The traditional roles of the bench, bar and the executive branch of government in the administration of justice deserve the re-examination that has occurred in recent years.

The independence of the Canadian judiciary is secured through the combined effect of the Constitution Act, 1867, Sections 96 and 101 and the Charter of Rights, Section 11(d). Such independence has been forged over the centuries so that the rights and liberties of the citizen may be protected.

In order that the courts continue to fulfil this vital role, they must maintain the respect, confidence and trust of the public. They must be accountable and responsible to the concerns of citizens. The accountability of the judiciary to the public will foster understanding and confidence in the courts. Effective ways of accounting to the public while protecting institutional judicial independence must be devised.

This report does not propose cloaking every judge with administrative autonomy which could be subject to individual abuse. It is about an increase in efficiencies resulting from a rationalization of management.

PART IV RECOMMENDATIONS FOR CHANGE IN THE IMMEDIATE AND MEDIUM TERM

Immediate Reform

We recommend that a formalized structure be immediately established to facilitate direct judicial participation in the administration of the Ontario courts at all levels. To bring this about, the Committee proposes the establishment of an Interim Courts Administration Council to assume responsibility for the Ontario justice system.

The Committee recommends that the Interim Council be comprised of the Chief Justice of Ontario, the Chief Justice of the Ontario Court (General Division), the Chief Judge of the Ontario Court (Provincial Division) and the Attorney General or his designate. It is anticipated that the Attorney General designate would be the Deputy Attorney General. The Council would have ultimate responsibility for administrative and financial aspects of court administration. The Committee recognizes that during the interim period the statutory responsibility and accountability would remain that of the Attorney General who in turn is subject to both statutory and executive limitations and directions. The Committee, bearing in mind the temporary and *ad hoc* nature of the proposed interim arrangement is of the view that the operative terms could be cooperatively worked out.

It would not be Council's function to engage in all administrative matters on a province wide basis. Many regional matters would be routinely handled in the regions. For example, scheduling would remain with the Senior Regional Judges. The regional directors would be accountable to the Interim Council and Regional Senior Judges and would maintain their current reporting relationship with the Assistant Deputy Attorney General - Courts Administration. The exact division of responsibility would be agreed to by the judicial members of the Council and the Attorney General.

The Committee strongly supports the concept of responsibility being vested in the judiciary after consultation with their advisory groups to administer the regional systems and to formulate budgets and budget submissions. A formal system of province wide consultation

among the judiciary and the Council should be implemented to balance the needs of regional autonomy against the dangers of balkanization of the province.

In the immediate term further consideration should be given to ensure the appropriate level of continuing participation by the public and the bar.

Broad consultation with members of the public and the bar is necessary to increase public awareness of the importance of the justice system, and to ensure that adequate funding is provided for the justice system. The Ontario Courts Management Advisory Committee and the Regional Courts Management Advisory Committee should stay in place and be given a mandate to address means of reducing delays and costs, increasing efficiencies while at the same time making the administrative system workable and responsive to the needs of the users of the system, the litigants, their counsel, court staff and the judiciary.

A communication network should be put in place to ensure that the Regional Courts Management Advisory Committee's recommendations are considered by the judiciary in the regions. Their members with the assistance of the regional directors should review and implement useful recommendations. Appropriate matters should be forwarded to the Ontario Courts Administration Council and the Ontario Courts Management Committee for consideration.

Medium Term

We recommend that legislation be enacted transferring responsibility for administration of the Ontario courts to a Courts Administration Council. January 1994 is a suggested target date. The exact composition of that Council and other specifics would be arrived at over a period of extensive consultation leavened by the experience gained in the interim period.

The transfer of administrative responsibility would encourage judge directed innovation, initiative, efficiency and accountability in the system at all levels.

It is proposed that the judicial role in administration would be primarily supervisory

with direct operational responsibility being assigned to full time professional court administrators. The court administrators and their staff would be responsible to the judiciary. It is further proposed that both the judiciary and the court administrators and staff receive management training appropriate to court administration. The Committee is of the view that a judicially administered system must be subject to checks and balances to ensure judicial flexibility and responsiveness to ever changing public needs as well as to ensure ongoing consultation with users of the system.

The Committee is of the view that in the medium term a new adjunct to the civil service should be created, an Ontario Courts Service. Necessary staff and services relating to all the courts should be transferred from the Courts Administration Division of the Ministry of the Attorney General to the Ontario Courts Service.

The Committee recommends that the following ought to be transferred out of the Ministry of the Attorney General and into the Ontario Courts Service:

- court staff
- counter staff
- court interpreters
- court reporters
- accountants
- sheriff's staff
- court security staff
- program and systems staff
- human resources
- administrative and clerical staff working with the judiciary in relation to adjudication, judicial scheduling and scheduling of cases.

The goal of the recommendations of the Committee is the better administration of the courts. It is fundamental to the recommendations of the Committee that the dedicated men and women now serving the courts be retained, stimulated and motivated to participate in the changes that will be necessary. The implementation of the change must therefore

accommodate respect for existing career paths and collective bargaining rights. All programmes that are available and necessary should be applied in order to ensure security of employment and opportunity. It would be expected that staff members would retain equivalent government status in the Ontario Courts Service and that they would have mobility and career opportunities to transfer back and forth between the Ontario Courts Service and the Ontario Public Service.

The Committee is of the view that the Ontario Courts Service under judicial direction would ensure that staff will have defined career paths in the court system and that funds will be directly used in the justice system on an accountable basis.

Automation of the courts has lagged behind in Ontario as compared to other jurisdictions in Canada and abroad. Responsibility for automation would be in the Ontario Courts Service.

Similarly, the availability of timely and useful statistical reports is an essential element of good management. Their preparation should be under the direction of the judiciary.

It is suggested that the permanent Ontario Courts Service would contain divisions with respect to facilities automation and technology, finance and budget, judicial programmes, and human resources.

Before any formal structure is legislated into existence there should be a broad process of consultation to ensure that pressing concerns in the justice system are being adequately addressed, and that the management model is simple and responsive to identified concerns.

In the long term, issues such as judicial direction over capital expenditures for court facilities should also be addressed.

Method of Funding

Funding of our justice system presently is accomplished through allocations within the

Ontario government's budgetary and estimates process. After the government of the day presents its budget, each Ministry of government produces estimates within the budgetary guidelines outlining that Ministry's proposed spending for the fiscal year. Before the estimates are presented to the Legislative Assembly for examination, debate and enactment, they are reviewed internally. Each Ministry has to justify its proposal to Management Board.

The Courts Administration Division develops its estimates before going through the Management Board exercise. Those estimates must conform to overall Ministry objectives. Thus the needs of Ontario's courts are subject to priorities and pressures apart from those relating specifically to the justice system.

The Ministry of the Attorney General's estimates are considered, reviewed and debated, as are the estimates of other Ministries either by the whole of the Legislative Assembly or by a Committee thereof. Requests for monies specific to the courts are buried within the Ministry of the Attorney General's total estimates. The process does not highlight the importance of the courts system to our democratic form of government.

The allocation made is for the whole Ministry of the Attorney General on the basis of the various division and branch submissions. After allocation takes place, if it so decides, the Ministry in a fiscal year can use the funds allocated for Courts Administration for other purposes.

Similarly when cut-backs and roll-backs are effected by the government of the day in periods of restraint (such as in place presently) such reductions are usually applied across the board by imposing percentage reductions to the approved estimates for the government as a whole, without consideration of the particular needs of the specific Ministries or parts thereof or for the particular programme being administered.

A major underpinning of judicial independence is independence in budgeting and in expenditure of an approved judicial budget. As Chief Justice Laskin in "Some Observations on Judicial Independence" said: "Budget independence means that the budget should <u>not</u> be

part of any departmental budget but should be separately presented and dealt with".[19]

A review of the 1990-1991 Public Accounts of Ontario reveals that the total amount expended for the Courts Administration Programme was $239,262,113 or about 0.51% of the total Ontario governmental expenditures. On the revenue side the Courts Administration Program produced fees of $68,704,458 and fines and penalties of $146,025,280 for a total of $215,329,738. Not included are any transfer payments from the Government of Canada directly attributable to the Courts Administration Programme.

To ensure that the funds originally allocated to the justice system are used for the purposes of the justice system, it is proposed that the financial allocation for it be made directly by the Assembly. A representative of the Courts Administration Council on behalf of the justice system only, would present the justice system's submission based on information gathered and compiled by the judicial council and would answer such questions reasonably necessary to examine and justify its requirements. The judicial council would have to account for such expenditures directly to the Legislative Assembly. The justice system would be treated independently from the Ministry of the Attorney General. Precedents for independent treatment have been outlined earlier in this report. We note, in addition, that the Ombudsman, Information and Privacy Commission, Provincial Auditor, and Commission on Election Expenses receive their funding in a similar manner. The Courts Administration Council would each year report to the Legislative Assembly on the operations of the Ontario Court and seek approval of the plans and funds expected to be required by the Ontario courts. Amounts allocated to the Ontario courts would be disbursed to the Ontario court directly.

The Committee recognizes that the government has a responsibility to establish spending priorities among various competing interests. However, such a system would afford the justice system the dignity of specific consideration of its needs in light of the public interest in a strong and independent justice system. At the same time, the problems caused by underfunding will not disappear simply because these proposals are implemented. The

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[19] Address given to the Canadian Association of Provincial Court Judges -- New Judges Programme by Chief Justice B. Laskin "Some Observations on Judicial Independence", November 1, 1980.

government must remain accountable for the problems caused by chronic underfunding of the justice system.

Accountability

In addition to the Courts Administration Council's obligation to report annually to the Legislative Assembly on the operation of the Ontario courts, there exist several means to ensure that the judiciary through the Council is accountable for the expenditure of public funds. The Provincial Auditor will continue to have access to all financial records in relation to the administration of the courts. Accountability to the public might also be achieved through the means of an annual report published by the Council or by the presidents of the three courts. As mentioned earlier, other effective ways of accounting to the public while protecting institutional judicial independence should be considered and devised.

It should not be forgotten that in the adjudicative sphere, judges have been publicly accountable for some time. Both the Canadian Judicial Council and its provincial counterpart serve as a forum for addressing complaints of judicial misconduct, without compromising the fundamental principles relating to judicial independence.

Summary

Our recommendations are not radical. They are solidly based upon information reviewed including reports of positive experience elsewhere with systems similar to that being recommended. Our recommendations have evolved out of a spirit of cooperation which characterized our meetings springing from a common commitment to the ideals of justice. We are confident that that spirit of cooperation is a precursor of future attitudes about these proposals. This cooperation and commitment will be essential to bring this proposal to fruition. The bar remains ready and willing to consult and to work with others in every effort to deliver quality justice to the people of Ontario.

APPENDICES

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